(16)

No. 99-1908

Supreme Court, U.S.
FILED
NOV 13 2000
CLERK

In the
Supreme Court of the United States

NOV 13, 2000

JAMES ALEXANDER, in his official capacity as the Director of the Alabama Department of Public Safety, and the ALABAMA DEPARTMENT OF PUBLIC SAFETY,

Petitioners,

v.

MARTHA SANDOVAL, individually and on behalf of all others similarly situated,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND CENTER FOR EQUAL OPPORTUNITY IN SUPPORT OF PETITIONER

Of Counsel
MARK T. GALLAGHER
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

JOHN H. FINDLEY
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amici Curiae

28pp

QUESTION PRESENTED

Whether Congress intended to create a private cause of action in federal court against a state agency that receives federal grant funds, thereby allowing a private individual to enforce disparate effect regulations promulgated by federal agencies under Section 602 of the Civil Rights Act of 1964 and bypass the federal agency review and enforcement process established by Congress.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. THIS COURT SHOULD HOLD THAT TITLE VI AND ITS REGULATIONS REACH NO FURTHER THAN THE FOURTEENTH AMENDMENT AND THEREFORE IMPLEMENTING REGULATION MAY PROHIBIT ONLY INTENTIONAL DISCRIMINATION 5

II. THERE IS NO EVIDENCE TO DEMONSTRATE THAT CONGRESS INTENDED TO CREATE A PRIVATE CAUSE OF ACTION UNDER SECTION 602 OF TITLE VI 13

CONCLUSION 21

TABLE OF AUTHORITIES

Page

Cases

Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975) 12

Alexander v. Choate, 469 U.S. 287 (1985) 4, 9

American Trucking Associations, Inc. v. Browner, 175 F.3d 1027 (D.C. Cir. 1999), *cert. granted*, 120 S. Ct. 2193 (2000) 12

Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985) 12

Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995) 2

Bennett v. Spear, 520 U.S. 154 (1997) 2

Browner v. American Trucking Associations, Inc., 175 F.3d 1027 (D.C. Cir. 1999), *cert. granted*, 120 S. Ct. 2003 (2000) 12

Cannon v. University of Chicago, 441 U.S. 677 (1979) 15

Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994) 18-20

Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925 (3d Cir. 1997), *cert. granted*, 524 U.S. 915, *vacated as moot*, 524 U.S. 974 (1998) 4-5, 10, 17-19

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 2

City of Boerne v. Flores, 521 U.S. 507 (1997) 12

Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 18

Cort v. Ash, 422 U.S. 66 (1975) 13

Cureton v. National Collegiate Athletic Association, 198 F.3d 107 (3d Cir. 1999) 1

Douglas County v. Babbitt, 516 U.S. 1042 (1996) 2

Guardians Association v. Civil Service Commission of the City of New York, 463 U.S. 582 (1983) 4, 7-8

Helvering v. Hallock, 309 U.S. 106 (1940) 20

International Brotherhood of Teamsters v. Daniel, 439 U.S. 551 (1979) 15

Larry P. v. Riles, 793 F.2d 969 (9th Cir. 1984) 11

Lau v. Nichols, 414 U.S. 563 (1974) 4

National Association for the Advancement of Colored People v. Federal Power Commission, 425 U.S. 662 (1976) 11

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 19-20

Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158 (1989) 18

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 7

Rice v. Cayetano, 528 U.S. 495 (2000) 2

Sandoval v. Hagan, 197 F.3d 484 (11th Cir. 1999) 3-5, 10-11, 17

Shaw v. Reno, 509 U.S. 630 (1993) 2

St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) ... 2

Steel Company v. Citizens for a Better Environment, 523 U.S. 83 (1998) 2

Suter v. Artist M., 503 U.S. 347 (1992) 13

Thompson v. Thompson, 484 U.S. 174 (1988) 14

Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) 13-15

Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) 13-14

United States v. Fordice, 505 U.S. 717 (1992) 7, 9-11

United States v. Morrison, 120 S. Ct. 1740 (2000) 9

United States v. Philadelphia National Bank, 374 U.S. 321 (1963) 18

Valeria G. v. Wilson, 12 F. Supp. 2d 1007 (N.D. Cal. 1998) 1, 11

Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1977) 6

Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642 (1989) 6, 12

Washington v. Davis, 426 U.S. 229 (1976) 6, 11

Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) 12

Alabama Constitution

Amend. 509 2-3

Statutes

42 U.S.C. § 2000d-1 15-17

Regulations

28 C.F.R.. § 42.104(b)(2) 3

34 C.F.R. § 100.3(b)(6)(i) 11

49 C.F.R. § 21.5(b)(2) 3

Rules

United States Supreme Court Rule 37.3 1

Rule 37.6 1

Miscellaneous

Roger Clegg, *The Bad Law of Disparate Impact*, The Public Interest, Winter, 2000 12

Badford C. Mank, *Is There a Private Cause of Action Under EPA's Title VI Regulations?: The Need to Empower Environmental Justice Plaintiffs*, 24 Colum. J. Envtl. L. 1 (1999) 14, 18

Jimmy White, *Environmental Justice: Is Disparate Impact Enough?*, 50 Mercer L. Rev. 1155 (1999) 14

INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.3, Pacific Legal Foundation (PLF) and the Center for Equal Opportunity respectfully submit this brief amicus curiae in support of Petitioner.[1] Written consent for amici participation in this case has been obtained from all parties and has been lodged with the Clerk of the Court.

Pacific Legal Foundation is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF is headquartered in Sacramento, California, and has offices in Miami, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska.

Attorneys for Pacific Legal Foundation have previously litigated questions regarding the scope and meaning of Title VI of the Civil Rights Act of 1964. For example, Pacific Legal Foundation attorneys represented the California State Board of Education in a case that alleged California's Proposition 227, an initiative replacing bilingual education with English immersion, violated federal regulations promulgated pursuant to Section 602 of Title VI. *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007 (N.D. Cal. 1998). Pacific Legal Foundation also participated as amicus in *Cureton v. National Collegiate Athletic Association*, 198 F.3d 107 (3d Cir. 1999), a case

---

[1] Pursuant to Supreme Court Rule 37.6, Amici affirm that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

alleging that minimum standardized testing scores had a disparate impact on African-American student athletes in violation of regulations promulgated under Section 602 of the Civil Rights Act.

PLF has a long history of advocacy before this Court and has participated in numerous cases involving the interpretation of federal laws. For example, PLF was amicus curiae in *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83 (1998); *Bennett v. Spear*, 520 U.S. 154 (1997); *Douglas County v. Babbitt*, 516 U.S. 1042 (1996); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); and *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The Center for Equal Opportunity (CEO) is a District of Columbia nonprofit corporation. CEO's main purpose is to study issues concerning race, ethnicity, and language. CEO has participated actively in a wide variety of civil rights cases. *Rice v. Cayetano*, 528 U.S. 495 (2000); *Shaw v. Reno*, 509 U.S. 630 (1993); and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

PLF and CEO believe their public policy perspective and litigation experience will provide an additional viewpoint on the legal issues presented by this case.

STATEMENT OF THE CASE

Alabama has amended its constitution to make English the official language of the state. Ala. Const. amend. 509.[2] Acting

---

[2] Amendment 509 reads in relevant part:

> English is the official language of the state of Alabama. The legislature shall enforce this amendment by appropriate legislation. The legislature and officials of the state of Alabama shall take all steps necessary to insure that the role
>
> (continued...)

under this amendment, the Alabama Department of Public Safety adopted a policy requiring that all driver's license examinations be given in English. *Sandoval v. Hagan*, 197 F.3d 484, 502 (11th Cir. 1999). Martha Sandoval filed suit against the Department and its Director, challenging the English-only requirement. The gravamen of the suit alleged that Alabama's policy discriminated on the basis of national origin in violation of the Fourteenth Amendment to the United States Constitution, Title VI of the Civil Rights Act of 1964, and its implementing regulations.

The United States District Court for the Middle District of Alabama certified a plaintiff's class consisting of all legal residents of the State of Alabama who are otherwise qualified to obtain a driver's license but cannot do so because of the English language testing requirement. *Sandoval*, 197 F.3d at 488. The court ultimately concluded that Alabama's English-only driver's license requirement has a disparate impact on the basis of national origin and thus ran afoul of regulations promulgated by the United States Department of Transportation.[3] The court enjoined the use of the English-only testing policy. *Id.* at 489.

(...continued)

> of English as the common language of the state of Alabama is preserved and enhanced. The legislature shall make no law which diminishes or ignores the role of English as the common language of the state of Alabama.

[3] The regulations at issue in this case prohibit recipients of federal funding from adopting or enforcing policies that "directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting persons [individuals] to discrimination based on their race, color, or national origin." 49 C.F.R. § 21.5(b)(2), 28 C.F.R. § 42.104(b)(2).

The Eleventh Circuit Court of Appeals affirmed.[4] Relying on Eleventh Circuit precedent the court concluded that a private right of action exists under regulations promulgated pursuant to Section 602 of Title VI. *Id.* at 504. The court also observed that the only other circuit to have addressed the question in detail has also concluded that an implied private right of action exists under regulations promulgated under Section 602. *Id.* at 504 (citing *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925, 936-37 (3d Cir. 1997), *cert. granted*, 524 U.S. 915, *vacated as moot*, 524 U.S. 974 (1998)). The court also based its conclusion on this Court's "strong[] suggest[ion]" that an implied cause of action exists under Section 602. *Id.* The Eleventh Circuit, although recognizing that this Court had not squarely answered the question, ultimately held that a "close reading" of *Lau v. Nichols*, 414 U.S. 563 (1974), *Guardians Association v. Civil Service Commission of the City of New York*, 463 U.S. 582 (1983), and *Alexander v. Choate*, 469 U.S. 287 (1985), supported the conclusion that an implied private right of action exists under Section 602. *Id.* Based on this legal conclusion, the court held that the district court did not err in its conclusion that the English-only examination requirement constituted a disparate impact on the basis of national origin. *Id.* at 511.

SUMMARY OF ARGUMENT

The question presented by this case, whether Congress intended to create a private cause of action allowing private

---

[4] The court below held that the action was not barred by the Eleventh Amendment. First, because the Alabama Department of Public Safety had voluntarily accepted federal funding it had waived a claim of sovereign immunity. *Sandoval*, 197 F.3d at 500. Second, even if the action against the state itself was barred, the action against the director for injunctive relief could proceed under the *Ex Parte Young* doctrine. *Id.*

individuals to enforce disparate impact regulations promulgated by federal agencies under Section 602 of the Civil Rights Act of 1964, requires this Court to address two separate, but ultimately intertwined, issues. First, may Title VI, and the agency regulations promulgated under that statute, extend beyond the Fourteenth Amendment to prohibit not only purposeful discrimination, but also conduct having a disparate impact? Second, assuming Title VI regulations do prohibit conduct having a disparate impact, did Congress intend to create a private right of action to allow individuals to enforce those regulations? Both questions should be answered in the negative.

ARGUMENT

I

THIS COURT SHOULD HOLD THAT TITLE VI AND ITS REGULATIONS REACH NO FURTHER THAN THE FOURTEENTH AMENDMENT AND THEREFORE IMPLEMENTING REGULATION MAY PROHIBIT ONLY INTENTIONAL DISCRIMINATION

Before addressing the question of whether Congress intended to create a private right of action to enforce disparate impact agency regulations promulgated under Section 602, this Court must first address a more basic question regarding the scope and purpose of that section: Whether regulations that prohibit discriminatory impacts are valid exercises of agency authority under Section 602. The court below held that agencies do have the authority to create regulations that prohibit recipients of federal funding from engaging in actions that result in a disparate impact on the basis of race, color, or national origin. *Sandoval*, 197 F.3d at 501-02. Other courts have reached the same conclusion. *Seif*, 132 F.3d at 929. A review of this Court's precedents reveals, however, that this conclusion may be erroneous. If, as this Court has previously

held, Title VI protection extends no further than the Fourteenth Amendment, any agency regulation purporting to incorporate a disparate impact standard would be invalid. Before answering the question of whether Section 602 contemplates a private cause of action to enforce disparate impact regulations, this Court should first answer the question of whether Section 602 even allows for the promulgation of disparate impact regulations.[5]

The Fourteenth Amendment to the United States Constitution proscribes governmental conduct which has a discriminatory purpose or intent. *Washington v. Davis*, 426 U.S. 229, 242 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 264-65 (1977). A rule focusing on impact alone, and not intent or purpose, would "raise serious questions about" and threaten a "whole range of tax, welfare, public service, regulatory, and licensing statutes." *Washington v. Davis*, 426 U.S. at 248. Although this Court's most recent decision regarding the scope of Title VI makes clear that the statute

---

[5] The Court can and should reach this issue. It goes to the fundamental validity of the regulations, and so is fairly implicated in the question whether a lawsuit may be filed pursuant to them. The issue was raised in Petitioners' Reply Brief (p. 6 n.3) and their supplemental filing (*see, e.g.*, p. 9: "In sum, the combination of a private right of action *and overbroad federal regulations* promise a flood of litigation against federal grantees. *Private parties will use the courts to tell grantees to do something that neither the Constitution nor federal statutes mandate.*"). Finally, the issue is likely to be raised on remand in light of Respondent's 42 U.S.C. 1983 claim–even if the Court rules, as it should, that there is no private right of action under Section 602 of Title VI–so the Court should offer some guidance to the lower courts on how to handle the issue on remand (as it did in, for example, *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 655-61 (1989)).

extends no further than the Fourteenth Amendment, *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992), earlier decisions have led the lower courts to conclude that agencies may promulgate regulations that proscribe not only state action that involves discriminatory intent, but also actions having a disparate impact on the basis of race or national origin. This case presents this Court with an opportunity to clarify the scope and reach of Title VI and its regulations and establish that regulations, like the statute, may extend no further than the Fourteenth Amendment.

This Court's initial pronouncements on the subject indicated that Title VI was coextensive with the Constitution. "In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." *Regents of the University of California v. Bakke*, 438 U.S. 265, 287 (1978) (opinion of Powell, J.); *id.* at 352 (opinion of Brennan, White, Marshall, and Blackmun, JJ.) ("Title VI's definition of racial discrimination is absolutely coextensive with the Constitution's").

Guardians Association v. Civil Service Commission of the City of New York, 463 U.S. 582, involved a challenge by black and Hispanic police officers to written examinations used by the City of New York to make entry level appointments to the police department. 463 U.S. at 584. The challenge was brought under both Title VI and regulations promulgated pursuant to the statue. The court of appeals had determined that proof of discriminatory intent was required under both the statute and its implementing regulations. *Id.* at 584. The decision was affirmed.[6] However, five Justices rejected the

---

[6] Although five Justices concluded that proof of discriminatory impact or effect was sufficient to state a cause of action, the judgment of the lower court was affirmed because Justice White

(continued...)

notion that proof of discriminatory intent was required under Title VI and its implementing regulations. Justice White explained the views of the five Justices:

> The five of us reach the conclusion that the Court of Appeals erred by different routes. JUSTICE STEVENS, joined by JUSTICE BRENNAN and JUSTICE BLACKMUN, reasons that, although Title VI itself requires proof of discriminatory intent, the administrative regulations incorporating a disparate-impact standard are valid. *Post*, at 642-645. JUSTICE MARSHALL would hold that, under Title VI itself, proof of disparate-impact discrimination is all that is necessary. *Post*, at 623. I agree with JUSTICE MARSHALL that discriminatory animus is not an essential element of a violation of Title VI. I also believe that the regulations are valid, even assuming, *arguendo*, that Title VI, in and of itself, does not proscribe disparate-impact discrimination.

Guardians Association v. Civil Service Commission of the City of New York, 463 U.S. at 584 n.2. Four Justices also held that the Court's decision in *Bakke,* that Title VI was coextensive with the Constitution, should control. *Id.* at 611 (Powell, J., concurring, joined by the Chief Justice, and Rehnquist, J.); *id.* at 615 (O'Connor, J., concurring) ("Because petitioners have failed to prove intentional discrimination, I would affirm the judgment of the Court of Appeals."). The Court has since made

---

(...continued)
concluded that compensatory relief should not be awarded in the absence of proof of discriminatory intent. *Guardians Association*, 463 U.S. at 584. Justice White's view, in conjunction with the four Justices who would affirm because proof of discriminatory intent was necessary to bring an action, equaled five votes affirming the lower court's opinion.

clear that separate opinions cannot be added up to yield an opinion for the Court, *United States v. Morrison*, 120 S. Ct. 1740, 1757 (2000).

The issue was revisited, albeit indirectly, in *Alexander v. Choate*, 469 U.S. 287. In holding that a state's reduction in the number of days it would pay hospitals on behalf of Medicaid recipients did not violate Section 504 of the Rehabilitation Act of 1973, the Court reviewed its holding in *Guardians*.

> [T]he Court held that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI. In essence, then, we held that Title VI had delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts.

Alexander, 469 U.S. at 293-94 (footnote omitted). *Alexander* did not require this Court to determine the reach of Title VI. Instead, the Court merely compared Title VI and its implementing regulations with Section 504 of the Rehabilitation Act. *Id.* at 293. To the extent that *Alexander* simply restates the holding of *Guardians* it does nothing to further the understanding of Title VI's reach and scope.

The Court did, however, return to the question of whether Title VI was coextensive with the Fourteenth Amendment in *United States v. Fordice*, 505 U.S. 717. In *Fordice* the Court was called upon to determine the proper standard to be applied in evaluating whether a public university system had complied with its obligation to dismantle a *de jure* segregated university system. Responding directly to private petitioners' argument that the state system violated a ***regulation*** adopted pursuant to

Title VI, this Court reemphasized its holding in *Bakke* that Title VI reaches no further than the Fourteenth Amendment.

> Private petitioners reiterate in this Court their assertion that the state system also violates Title VI, citing a regulation to that statute which requires States to "take affirmative action to overcome the effects of prior discrimination." *34 CFR § 100.3(b)(6)(i)* (1991). ***Our cases make clear, and the parties do not disagree, that the reach of Title VI's protection extends no further than the Fourteenth Amendment.*** See *Regents of Univ. of California v. Bakke, 438 U.S. 265, 287, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978)* (opinion of Powell, J.); *id., at 328* (opinion of Brennan, WHITE, Marshall, and BLACKMUN, JJ., concurring in judgment in part and dissenting in part); see also *Guardians Assn. v. Civil Service Comm'n of New York City, 463 U.S. 582, 610-611, 77 L. Ed. 2d 866, 103 S. Ct. 3221 (1983)* (Powell, J., concurring in judgment); *id., at 612-613* (O'CONNOR, J., concurring in judgment); *id., at 639-643* (STEVENS, J., dissenting). We thus treat the issues in these cases as they are implicated under the Constitution.

United States v. Fordice, 505 U.S. at 732 n.7 (emphasis added).

Taken together *Fordice* and *Bakke* stand for the proposition that Congress intended Title VI, and all regulations enacted pursuant to the statute, to proscribe only that conduct prohibited by the Constitution. This chain of authority, however, is not unbroken. Lower courts have looked to *Guardians* and *Alexander* to support the position that Title VI and its regulations exceed the reach of the Fourteenth Amendment and proscribe conduct which has a discriminatory impact, regardless of intent, on the basis of race and national origin. *Sandoval*, 197 F.3d at 502; *Seif*, 132 F.3d at 929. These courts have grudgingly acknowledged this Court's holding in

Fordice, but they have ultimately chosen not to follow that decision. The Court below brushed past *Fordice* by explaining that "[w]hile not altogether clear, we believe the footnote merely confirms that a Title VI suit, based on the statute alone, must prove intentional discrimination similar to an Equal Protection claim." *Sandoval*, 197 F.3d at 507 n.24. This is a curious explanation given that petitioners in *Fordice* based their claim on a ***regulation*** (34 C.F.R. § 100.3(b)(6)(i)), and not the ***statute*** alone. *Fordice*, 505 U.S. at 732 n.7.

The rule articulated by *Bakke* and *Fordice* is also consistent with the rationale underlying *Washington v. Davis*. There the Court warned that allowing an equal protection claim to proceed under a disparate impact theory would threaten, and perhaps invalidate, "a whole range of tax, welfare, public service, regulatory, and licensing statutes," *Davis*, 426 U.S. at 248. By ignoring the teachings of *Bakke* and *Fordice* and allowing Title VI actions to proceed under a disparate impact theory, lower courts have turned the statute into the weapon of choice for attacking democratically enacted social policy in the federal courts. *Larry P. v. Riles*, 793 F.2d 969, 981 (9th Cir. 1984); *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007 (N.D. Cal. 1998) (Disparate impact challenge filed against state initiative replacing a failed bilingual education program with a more effective English-immersion system.).

This Court has acknowledged in cases like *Washington v. Davis* that the difference in disparate impact versus disparate treatment causes of action is one of kind, not just degree. Because intent is irrelevant in a disparate impact case, that cause of action is fundamentally different from a disparate treatment claim. Just as a regulator cannot ban even intentional discrimination without statutory authority, *see National Association for the Advancement of Colored People v. Federal Power Commission*, 425 U.S. 662 (1976), so it is acting ultra vires if it redefines discrimination in such a fundamental way without a statutory basis. This Court disallowed Congress'

attempt to transform a disparate treatment standard into a disparate impact standard in *City of Boerne v. Flores*, 521 U.S. 507 (1997). If Congress, which has authority to enforce the Fourteenth Amendment under Section 5, can be barred from making this transformation, then surely an agency can be as well. Especially troubling in this regard is the fact that, in the nondiscrimination context, a ban on disparate impact will often threaten not only a "whole range" of otherwise legitimate laws, but will in fact *encourage* race-consciousness and disparate treatment–the very behavior Congress sought to ban. *See Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. at 652-53; *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 992-94 & n.2 (1988) (plurality opinion); *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 449 (1975) (Blackmun, J., concurring in judgment); Roger Clegg, *The Bad Law of Disparate Impact*, The Public Interest, Winter, 2000, at 79. Finally, the agency's rewriting of the statute raises other constitutional problems as well, since the regulations are being applied here to a state government in a manner that Congress has not approved at all, let alone approved "unequivocally," *see Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985). And if Congress has given agencies such broad authority to write regulations, then problems are raised under the nondelegation doctrine, *see American Trucking Associations, Inc. v. Browner*, 175 F.3d 1027 (D.C. Cir. 1999), *cert. granted*, 120 S. Ct. 2193 (2000), and *Browner v. American Trucking Associations, Inc.*, 175 F.3d 1027 (D.C. Cir. 1999), *cert. granted*, 120 S. Ct. 2003 (2000).

Allowing Title VI regulations to be wielded in such an imprecise manner contravenes the intent of Congress and ignores the holdings of this Court. This Court should use this case to reaffirm the principle established in *Bakke* and echoed in *Fordice*, that Title VI, and its implementing regulations, can be extended no further than the Fourteenth Amendment.

II

THERE IS NO EVIDENCE TO DEMONSTRATE THAT CONGRESS INTENDED TO CREATE A PRIVATE CAUSE OF ACTION UNDER SECTION 602 OF TITLE VI

Separate and apart from the question of whether implementing regulations that incorporate a disparate impact standard are invalid because they exceed the reach of the Fourteenth Amendment is the question of whether an implied private right of action exists under Section 602. Determining whether an implied private right of action exists under the statute is solely a question of congressional intent. Here, neither the plain language of the statute, nor the legislative history generated by the Congress which enacted Section 602, demonstrates an intent to create a private cause of action. Absent this intent, there can be no private right of action.

This Court has consistently held that a private right of action will be found only if there exists affirmative evidence that Congress intended to create such an action. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979) ("[W]hat must ultimately be determined is whether Congress intended to create the private remedy asserted . . . ."); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979) ("[O]ur task is limited solely to determining whether Congress intended to create the private right of action . . . ."); *Suter v. Artist M.*, 503 U.S. 347, 364 (1992) ("The most important inquiry here as well is whether Congress intended to create the private remedy sought by the plaintiffs.").[7]

---

[7] Focusing exclusively on congressional intent represents a doctrinal departure from the four-factor test established in *Cort v. Ash*, 422 U.S. 66, 78 (1975). Under that test courts looked to whether (1) the plaintiff was in the class for whose benefit the statute was enacted;

(continued...)

This Court has not yet had an opportunity to determine whether Congress intended to create a private right of action under Section 602. "[B]ecause Guardians did not directly address whether a private right of action exists under Title VI's implementing regulations, the issue remains unresolved." Badford C. Mank, *Is There a Private Cause of Action Under EPA's Title VI Regulations?: The Need to Empower Environmental Justice Plaintiffs*, 24 Colum. J. Envtl. L. 1, 34 (1999) (footnotes omitted). *Accord* Jimmy White, *Environmental Justice: Is Disparate Impact Enough?*, 50 Mercer L. Rev. 1155, 1174 (1999) ("Whether a private right of action existed under the regulations was not, however, explicitly addressed in Guardians Ass'n."). A review of both the language and legislative history of Section 602 reveals no evidence that Congress intended to create a private cause of action under the statute.

The first and best evidence of congressional intent is, of course, the language of the statute itself and where the language of the statute is clear, the inquiry into legislative intent generally need go no further. In *Touche Ross* this Court

---

(...continued)
(2) there was any explicit or implicit indication of legislative intent to create a remedy; (3) a private remedy was consistent with the purpose of the statute; and (4) the cause of action was one that is traditionally relegated to state law. The analysis set forth in *Transamerica* and *Touche Ross* makes the second *Cort* factor, congressional intent, the dispositive inquiry. *See Thompson v. Thompson*, 484 U.S. 174, 189 (1988) (Scalia, J., concurring) ("It could not be plainer that we effectively overruled the *Cort v. Ash* analysis in *Touche Ross & Co. v. Redington*, 442 U.S. at 575-76, and *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. at 18, converting one of its four factors (congressional intent) into *the determinative factor*, with the other three merely indicative of its presence or absence.").

explained that the search for congressional intent to create a private right of action must begin with the language of the statute.

> Instead, our task is limited solely to determining whether Congress intended to create the private right of action asserted by SIPC and the Trustee. And as with any case involving the interpretation of a statute, our analysis must begin with the language of the statute itself.

Touche Ross & Co., 442 U.S. at 568 (citing *Cannon v. University of Chicago*, 441 U.S. 677, 689 (1979)); *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 558 (1979).

There is nothing on the face of Section 602 of Title VI indicating that Congress intended for this legislation to create a private cause of action. To the contrary, the structure and language of Section 602 shows that Congress intended that only federal agencies would enforce the provision. Section 602 provides:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of Section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. ***Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to***

> ***continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement . . . or (2) by any other means authorized by law: Provided, however, that no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.*** In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

42 U.S.C. § 2000d-1 (emphasis added).

Section 602, on its face, charges the federal government with ensuring that its rules, regulations, and orders of general applicability are adhered to by recipients of federal funding. The structure of Section 602 contemplates that the federal government, and not private plaintiffs, will ensure compliance with any requirement adopted pursuant to Section 602. The statute establishes two prongs to ensure that recipients of federal funds comply with federal mandates. Plainly, only federal agencies can enforce the first prong: termination or denial of financial assistance. The second prong, "any other means authorized by law," in isolation, could be read broadly to include injunctive relief not limited to federal agencies. However, this reading of the statute becomes impossible when

the "any other means authorized by law" language is read in the context of the statutory scheme. The provision immediately following the "any other means language" makes clear that Congress intended to place the enforcement of Section 602 exclusively in the hands of the federal government. The statute dictates that "no such action shall be taken until the department or agency concerned" has sought and failed to obtain compliance "by voluntary means." *Id.* Before a federal agency may terminate funding or assistance, the head of that department must file a report with the committees of the House and Senate which have legislative jurisdiction over the program or activity at issue. This language, as well as the structure of the statutory scheme, plainly does not envision a private right of action. Rather, the statute charges the federal agencies and departments that control the purse strings with ensuring that the departments' or agencies' rules and regulations are followed by the recipients of federal funding.

Unable to find evidence of congressional intent on the face of Section 602, lower courts have delved into the statute's legislative history in search of evidence that Congress intended to create a private right of action. These judicial expeditions have gone astray, as lower courts have erroneously looked to the legislative intent of the Congress which amended the statute in 1987, instead of the Congress which actually passed the statute in 1964. The court below did not engage in an independent review of the legislative history of Section 602. Instead, the court relied on the Third Circuit's evaluation of the statute's legislative history. *Sandoval*, 197 F.3d at 504 ("The *Seif* court then determined that an implied private right of action was supported both by Title VI's legislative scheme and legislative history."). In *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d at 936-37, the Third Circuit reviewed the legislative history surrounding the 1987 amendments to Title VI and, based solely on this evidence, concluded that there was "some" indication in the legislative

history "of an intent to create a private right of action, in satisfaction of the Cort factors." *Seif*, 132 F.3d at 934.

The court of appeals' reliance on the subsequent legislative history of the 1987 amendments conflicts with the rulings of this Court. *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994), required this Court to determine whether private civil liability under 10(b) of the Securities Exchange Act of 1934 extended beyond those persons who engaged in manipulative and deceptive practices to those who merely aided and abetted the violation. In an attempt to demonstrate that the Act did cover aiding and abetting liability, respondent in that case relied upon 1983 and 1988 Congressional Committee Reports. This Court rejected this attempt to use 1983 and 1988 indicia of congressional intent. "'[W]e have observed on more than one occasion that the interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute.'" *Central Bank*, 511 U.S. at 185 (quoting *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 168 (1989)). "In evaluating the weight to be attached to these statements, we begin with the oft-repeated warning that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-18 (1980) (quoting in part *United States v. Philadelphia National Bank*, 374 U.S. 321, 348-49 (1963)). As one commentator summarized this line of authority "[s]everal Supreme Court decisions suggest that a private right of action may be implied by courts only if the original Congress enacting a statute intended to create a private right, or a subsequent Congress explicitly amended the statute to do so." Mank, *supra*, at 44.

Lower courts searching for, and ultimately finding, evidence of an intent to create a cause of action have ignored this "oft-repeated warning" and looked ***solely*** to the legislative

history that was generated by the 1987 amendments to Title VI. In *Seif* the United States as amicus suggested, and the court agreed, that the implication of a private right of action was consistent with the legislative intent because Congress was aware of the existence of a private right of action when it amended Title VI in 1987. *Seif*, 132 F.3d at 933-34. The reasoning follows that because Congress was aware of this interpretation of Section 602, and did nothing to correct it, congressional silence on the matter constitutes acquiescence. This method of determining congressional intent is flawed for two reasons.

First, as was explained in Section I, *supra*, it is not at all clear from this Court's precedent that an implied private right of action does exist to enforce disparate impact regulations promulgated under Section 602. As the Third Circuit in *Seif* conceded, "Guardians did not explicitly address whether a private right of action exists under discriminatory effect regulations promulgated under section 602." *Seif*, 132 F.3d at 929. Hence, given the extreme uncertainty as to whether a right to bring a private cause of action under Section 602 regulations even exists, it is impossible to conclude that Congress has somehow endorsed this right.

Second, the idea of congressional acquiescence is doctrinally flawed. As this Court explained in *Central Bank*:

> Furthermore, our observations on the acquiescence doctrine indicate its limitations as an expression of congressional intent. "It does not follow . . . that Congress' failure to overturn a statutory precedent is reason for this Court to adhere to it. It is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the [courts'] statutory interpretation . . . ."

Central Bank, 511 U.S. at 186 (quoting in part *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989)).

The lower court's search for evidence of congressional intent to create a private right of action under Section 602 is fundamentally flawed. By looking only to congressional intent surrounding the 1987 amendments to Title VI, and ignoring the intent of the Congress that enacted Section 602 as expressed in the language of the section, the lower courts have engaged in a method of determining legislative intent that has been expressly rejected by this Court. Moreover, the legislative history culled from the 1987 amendments demonstrates only an awareness that Title VI had been interpreted to allow private causes of action. The fact that individual members of Congress were aware that Title VI had received this judicial gloss and did nothing to correct this interpretation does not mean that Congress intended to create a private cause of action. *Helvering v. Hallock*, 309 U.S. 106, 121 (1940) ("we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle").

Once the legislative history generated by the 1987 amendments is removed from the equation it becomes apparent that there is no evidence that Congress intended to create a private cause of action under Section 602. First, nothing in the language or structure of that section hints that Congress intended to create a private cause of action to enforce the section. To the contrary, the words of the statute make plain that federal agencies and departments are charged with ensuring that their rules and regulations are adhered to by the recipients of federal moneys. Second, there is no legislative history indicating that the Congress that enacted the section intended to create a cause of action. Once the legislative history surrounding the amendments to the section is properly discarded, there is nothing left to support the conclusion that Congress intended to create a private cause of action under Section 602.

CONCLUSION

Respondents' attempt to challenge the Alabama English-only driver's license examination requirement must be rejected for two reasons. First, this Court's precedent establishes that Title VI and its regulations can extend no further than the Fourteenth Amendment. As a result, allegations that the state's driver's license requirement has a discriminatory effect are insufficient to state a cause of action under the regulations. Instead, as with the Fourteenth Amendment, a challenge to the state law must be predicated on a claim of intentional discrimination. Second, aside from the question of whether Title VI is coextensive with the Constitution, there is no evidence that Congress intended to create a private right of action to enforce Title VI regulations. Neither the plain language of the statute, nor the legislative history generated by the Congress that enacted Section 602, indicates that Congress intended to create a private cause of action to enforce the regulations. Instead, the structure and language of Section 602 demonstrate that federal agencies, not individual litigants, are charged with enforcing regulations promulgated under the statute.

DATED: November, 2000.

Respectfully submitted,

Of Counsel
MARK T. GALLAGHER
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

JOHN H. FINDLEY
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amici Curiae